

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

BECKY JEAN MORGAN,

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No. 01-628V

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Special Master Christian J. Moran

Petitioner,

*

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v.

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Filed: April 2, 2007

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

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Judgment on the record; denial of
compensation; hepatitis B; establish
jurisdiction on the pleadings.

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Respondent.

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Clifford J. Shoemaker, Shoemaker & Associates, Vienna, Virginia for petitioner
Traci R. Patton, United States Dep't of Justice, Washington, D.C. for respondent

UNPUBLISHED DECISION¹

On November 6, 2001, Becky Jean Morgan filed a petition in which she alleged that she received the hepatitis B vaccine and that the vaccine caused her urticaria to be significantly aggravated. Pet. ¶¶ 4-5. Ms. Morgan seeks compensation for this condition pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq. (“Vaccine Act”).

¹ Pursuant to 42 U.S.C. § 300aa-12(d)(3)(A), this document constitutes a final “decision.” Unless a motion for review is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.

Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

On November 8, 2006, Ms. Morgan filed a motion for a judgment on the record in which she conceded that she cannot prove one of the elements necessary for her to prevail – causation. In its response to Ms. Morgan’s motion, respondent agreed that “entitlement to compensation has not been established based on that record.” Resp’t Res. at 2. However, respondent denied that this Court has the requisite jurisdiction to entertain Ms. Morgan’s petition. Consequently, respondent argued the petition must be dismissed. Id.

As explained in more detail below, this Court possesses jurisdiction to entertain Ms. Morgan’s petition because her petition contains an allegation that, among other things, she received the hepatitis B vaccine and it significantly aggravated a pre-existing condition. Having resolved that this Court possesses jurisdiction, the next question is whether Ms. Morgan is entitled to a ruling upon the record. This Court finds her petition ripe for a decision. Thus, her motion for ruling upon the record is GRANTED.

Finally, this Court must determine if Ms. Morgan is entitled to compensation. The record demonstrates that Ms. Morgan has not established any of the requisite elements of a claim under the Vaccine Act. Therefore, she is not entitled to compensation and her petition is DENIED. The Clerk is directed to enter judgment accordingly.

I. Facts and Procedural History

The “facts” about Ms. Morgan are sparse, as no medical records or evidence of any kind has been filed. However, the following events are alleged in the petition.

On May 20, 1998, Ms. Morgan received her second dose of the hepatitis B vaccination. Pet. ¶ 4. After this dose, Ms. Morgan began to suffer from urticaria. “Urticaria” is “[a] skin

condition characterized by intensely itching welts.” American Heritage Dictionary (2d College Ed. 1985) at 1330.

On November 5, 1998, Ms. Morgan received another (presumably, third) dose of the hepatitis B vaccination. Pet. ¶ 4. This dose caused a “significant aggravation” of her urticaria. Pet. ¶ 5.

On November 6, 2001, Ms. Morgan contacted Mr. Clifford Shoemaker, an attorney. Mr. Shoemaker filed a petition on behalf of Ms. Morgan on the same day “so that the statute of limitations can be preserved.” Pet. ¶ 9.

No medical records were filed with the petition. No meaningful action took place in this case for several years. (In other cases, attorneys for petitioners and attorneys for respondent attempted to establish a process for resolving the numerous cases alleging that the hepatitis B vaccine caused various illnesses. This good-faith attempt, which was unsuccessful, necessarily delayed development of many cases. Although the docket in Ms. Morgan’s case does not reflect the reason for the lack of progress, some delay can probably be attributed to this effort.) In 2006, this case was assigned to the present special master.

A status conference was held on March 29, 2006. Ms. Morgan was ordered to file an affidavit expressing her interest in continuing the case by June 26, 2006. Order, dated March 29, 2006.

On June 26, 2006, Ms. Morgan’s attorney filed a motion for an enlargement of time, requesting additional time to file an affidavit from Ms. Morgan. Ms. Morgan’s attorney stated that he was having difficulty reaching Ms. Morgan to discuss her case with her. This motion and another similar motion for enlargement of time filed on July 30, 2006 were both granted.

Ms. Morgan's attorney filed a status report on August 30, 2006, in which he stated that Ms. Morgan did not want to pursue her case. Eventually, Ms. Morgan filed the pending motion for judgment on the record. When Ms. Morgan filed her motion, she had not filed any medical records. Respondent filed its response to Ms. Morgan's motion one week later.

Although Ms. Morgan did not file a reply brief, Ms. Morgan was given an additional opportunity to submit material showing that she received the hepatitis B vaccine. Order, dated January 23, 2007. This deadline passed without Ms. Morgan filing additional materials. Thus, the matters are ripe for decision.

II. Jurisdiction

Jurisdiction is a "threshold" issue that must be addressed first. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter ... is 'inflexible and without exception.'") (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)). This principle restricts how the Office of Special Master adjudicates petitions seeking compensation through the Vaccine Program. O'Connell v. Sec'y of Health & Human Servs., 63 Fed. Cl. 49, 57 n. 7 (2004). Consequently, it is necessary to resolve the jurisdictional issue even though Ms. Morgan concedes that she cannot prove her case. Id.; see also Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996) (stating "any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits") (emphasis in original); but see Nippon Steel Corp. v. United States, 219 F.3d 1348, 1353 (Fed. Cir. 2001) (refraining from determining whether Court of International Trade possessed jurisdiction in which the jurisdictional question was complex and inexplicably intertwined with the merits question).

The Office of Special Masters is obligated to consider its jurisdiction even when respondent fails to raise the issue directly. Barnett, 83 F.3d at 1383. Here, respondent presents its jurisdictional argument in this sentence: “A decision based on the record as it now stands must result in a dismissal of this case, for ‘where the court has no jurisdiction, it has no power to do anything but strike the case from its docket.’” Resp’t Res. at 2. (citations omitted). While respondent’s jurisdictional argument is not particularly developed, it does raise the issue. Moreover, regardless of respondent’s position, jurisdiction may be raised sua sponte. McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936); Hines v. Sec’y of Health & Human Servs., 940 F.2d 1518, 1522 (Fed. Cir. 1991).

For the reasons explained in depth in Rydzewski v. Sec’y of Health & Human Servs., Fed. Cl. No. 99-571, 2007 WL _____ (Fed. Cl. Spec. Mstr. Mar. 12, 2007), petitioners establish the jurisdiction of this Court when they present an allegation that a covered vaccine caused or significantly aggravated an illness.

Here, Ms. Morgan’s petition contains the requisite allegations that she received a covered vaccine and was injured as a result. Respondent has not identified any missing elements and an independent review of the petition does not uncover any deficiencies. As such, the facts alleged bring the case within the jurisdiction of the Court. See Patton v. United States, 75 F.Supp. 470, 472 (Cl. Ct. 1948); Rydzewski, Fed. Cl. No. 99-571.

Because there is jurisdiction, this Court must decide the case upon the merits.

III. Ruling On The Merits

Ms. Morgan has moved for a ruling based upon the existing record. Pet’r Mot. Previously, Ms. Morgan’s attorney relayed her desire not to continue her case. Pet’r Status

Report, filed August 30, 2006.² In light of this statement, additional factual development is not necessary for this Court to enter a decision. See 42 U.S. C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b).

No evidence supports any of Ms. Morgan's assertions, including her assertion that she received two doses of the hepatitis B vaccine in 1998. To discuss the "record" in this case is somewhat of a misnomer because, in fact, there is no record. There are no medical records, affidavits, or anything else that could be considered evidence. There is only the petition signed by the attorney, and, assertions of counsel are not evidence. U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 707 (Fed. Cir. 1988).

Consequently, due to a lack of proof on every element, Ms. Morgan has failed to establish that she is entitled to compensation.

² Ms. Morgan has not sought to withdraw her case voluntarily. Presumably, she has not taken this step, which would appear to be a more simpler way for a petitioner to concede a case, to preserve her right to file a lawsuit in an appropriate state court.

Before a lawsuit regarding an injury caused by a vaccine administrator or manufacturer may be filed in state court, a petitioner must obtain a "judgment" from this Court. § 21(a). "Judgments" follow "decisions" by special masters. § 12(d) and § 12(e). "Decisions" of special masters, in turn, include "findings of fact and conclusions of law." § 12(d)(3)(A). Ms. Morgan's pending motion will eventually produce a judgment.

In contrast, a voluntary withdrawal of an action causes the Court not to issue a "judgment." Robinson v. Sec'y of Health & Human Servs., No. 04-041V, 2004 WL 2677197 (Fed. Cl. Spec. Mstr. Nov. 3, 2004); Hamilton v. v. Sec'y of Health & Human Servs., No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003).

Thus, a voluntarily withdrawal prevents Ms. Morgan from maintaining a lawsuit against a vaccine administer or manufacturer. To obtain the necessary judgment, Ms. Morgan must follow the procedure she has taken.

IV. Conclusion

For these reasons stated above, petitioner's motion for judgment on the record is GRANTED and petitioner's claim for compensation is hereby DENIED. In the absence of a motion for review, the Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master